

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

LAKSANA P. SIMANGUNSONG,

Plaintiff,

v.

THE ALASKA VICTORY, et al.,

Defendants.

CASE NO. C04-458JLR

ORDER

**I. INTRODUCTION**

This matter comes before the court on Defendants' motion to exclude testimony from three of Plaintiff's experts (Dkt. # 60). For the reasons stated below, the court GRANTS the motion in part and DENIES it in part.

**II. BACKGROUND**

Plaintiff designated Charles Jacobson, Dr. Theodore Becker, and Dr. Daniel Brzusek as potential experts in his February 2004 initial disclosures. At several times during discovery, Plaintiff reiterated his intent to rely on these three experts, but did not disclose their opinions. The court twice extended the deadline for expert discovery while Plaintiff attempted to resolve immigration issues so that he could reenter the United States from Indonesia. Despite the court's extensions, Plaintiff submitted no expert reports in advance of the April 14, 2005 deadline.

1 In June 2005, Plaintiff reentered the United States pursuant to a special exemption  
2 from United States Immigration and Customs Enforcement Services. Soon thereafter, Dr.  
3 Brzusek and Dr. Becker examined Plaintiff. They completed their respective expert  
4 reports on June 14 and July 22, 2005. During the same period, the Defendants' medical  
5 expert examined Plaintiff and submitted an expert report.

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7 It is not clear when Plaintiff provided the reports of Dr. Becker and Dr. Brzusek to  
8 the Defendants. Plaintiff's counsel declares that he provided both reports "as soon as  
9 [they] were completed." Dickman Decl. ¶ 3 (Dkt. # 57). Defense counsel asserts that  
10 Defendants were "unaware of the opinions and conclusions of any of plaintiff's experts  
11 until their reports were received in August, 2005 . . . ." Defs.' Mot. at 3. Defendants  
12 offer no declaration or other evidence to support that assertion.

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14 There is no question that Defendants did not receive Mr. Jacobson's report until at  
15 least August 18, 2005. Unlike Dr. Becker and Dr. Brzusek, Mr. Jacobson never met with  
16 Plaintiff. He based his opinion (that the area of the ALASKA VICTORY on which  
17 Plaintiff suffered an injury was unsafe) on Plaintiff's deposition transcript, a statement  
18 from Plaintiff, and two photos taken onboard the ALASKA VICTORY.

19 Defendants now seek to exclude all three experts' reports as untimely, and to  
20 prevent the experts from testifying at trial.

### 21 **III. ANALYSIS**

22 The court finds "substantial justification" for the late disclosure of Dr. Brzusek's  
23 and Dr. Becker's reports under Fed. R. Civ. P. 37(c)(1). Ordinarily, the court has little  
24 tolerance for tardy expert disclosures, but Plaintiff's inability to enter this country until  
25 June 2005 makes this case atypical. All parties were on notice that no physical  
26 examination of the Plaintiff could occur until Plaintiff reentered the country. Once he  
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1 was available, Defendants quickly conducted their own expert examination. The court  
2 will thus permit Dr. Brzusek and Dr. Becker to testify at trial.

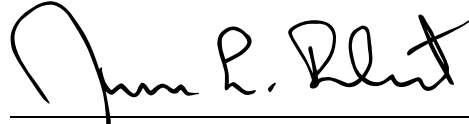
3 The court orders Plaintiff to make Dr. Becker and Dr. Brzusek available for  
4 deposition no later than ten days before trial. The court's finding of "substantial  
5 justification" should not be confused with approval of Plaintiff's counsel's conduct with  
6 respect to these experts' reports. Counsel could have obviated the need for this motion,  
7 which comes one month before trial, by informing Defendants that the two experts were  
8 examining Plaintiff, and providing a schedule for disclosing their opinions and for  
9 rebuttal discovery if necessary. If Defendants were unwilling to agree to this  
10 accommodation, a motion (or even a telephone call) to this court would have made short  
11 work of their objection well in advance of trial. Although counsel for both parties share  
12 the blame for this eleventh hour discovery dispute, Plaintiff bears the burden of proof at  
13 trial, and thus his counsel bears the professional burden of making a better effort to  
14 coordinate discovery.  
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16 The court now turns to the late disclosure of Mr. Jacobson's report. None of the  
17 court's reasoning above applies here. Unlike Dr. Brzusek and Dr. Becker, Mr. Jacobson  
18 had no contact with Plaintiff, and could have disclosed his report months ago. Plaintiff's  
19 counsel contends that language barriers between himself and his client prevented Mr.  
20 Jacobson from receiving meaningful information from Plaintiff until after his deposition.  
21 This is a poor excuse. Under even the most minimalist view of professional  
22 responsibility, counsel must overcome a language barrier with his client long before this  
23 stage in the litigation. Counsel filed this action in February 2004. His inability to  
24 communicate with his client effectively enough to inform his expert before July 2005 is  
25 inexcusable. Plaintiff may not rely on Mr. Jacobson's report, and Mr. Jacobson will not  
26 testify at trial.  
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1 **IV. CONCLUSION**

2 For the reasons stated above, the court GRANTS Defendants' motion in part and  
3 DENIES it in part (Dkt. # 60).

4 Dated this 20th day of September, 2005.

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6  
7 JAMES L. ROBART  
8 United States District Judge  
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